

**STATE OF OKLAHOMA,**

**Plaintiff,**

**v.**

**TYSON FOODS, INC., et al.,**

**Defendants.**

**No. 05-CV-329-GKF-SAJ**

**STATE OF OKLAHOMA'S REPLY BRIEF IN FURTHER SUPPORT OF ITS  
MOTION TO RECONSIDER AMENDED SCHEDULING ORDER [DKT #1386]**

Plaintiff, the State of Oklahoma, ex rel. W.A. Drew Edmondson, in his capacity as Attorney General of the State of Oklahoma and Oklahoma Secretary of the Environment C. Miles Tolbert, in his capacity as the Trustee for Natural Resources for the State of Oklahoma ("the State"), respectfully replies to "Defendants' Response in Opposition to Plaintiffs' [sic] Motion to Reconsider Amended Scheduling Order" [DKT #1422] as follows:

**A. Reconsideration is appropriate**

The State has sought reconsideration on two points relating to the Amended Scheduling Order [DKT #1376] (the "Order"). First, the State seeks reconsideration of the Order to the extent that it continues to divide experts' reports between those related to "damages" and those related to everything other than "damages." The State seeks to clarify this division so that it defines the division as being between those opinions addressing everything other than "relief" and those reports addressing "relief" regardless of whether the relief is injunctive or monetary. Second, the State seeks reconsideration of the Order inasmuch as the Order currently has "Defendants' Expert Reports on Damages" and the "Discovery Cut-Off" both scheduled for the

same date -- thereby providing the State no time for discovery following Defendants' disclosure of their experts on "damages."

Both of these issues were previously presented to the Court. Neither of these two issues was addressed in the Order nor was there any explanation in the Order relative to these two issues. These issues are therefore appropriate for reconsideration.

**B. A division between relief-related and non-relief-related experts is more logical than a division between damages-related and non-damages-related experts**

The State's request to divide the expert disclosures between relief-related and non-relief-related matters is eminently logical in the context of an environmental case where, as here, the interplay between damages relief and injunctive relief is significant. Thus, as presented in its original filing, clarification of the language in the original Scheduling Order would be provided by using the terms "relief-related" and "non-relief-related" rather than "damages" and "non-damages." Although clearly raised by the State, the Court amended the Scheduling Order without any discussion and apparently overlooked this issue, thereby making this issue, contrary to Defendants' suggestion, appropriate for reconsideration.

**C. The State is clearly entitled to discovery of Defendants' experts on remedy**

Concerning Defendants' opposition to the reconsideration of the time between the filing of Defendants' final round of expert reports and the close of discovery, Defendants' objections follow the most predictable rule in Defendants' advocacy, *i.e.*, if the plaintiff requests it, the defendant opposes it, and does so regardless of positions previously taken.

The original Scheduling Order [DKT #1075] provided that Defendants' expert reports on damages were to be filed June 1, 2008 and discovery was to remain open for a month until July 1, 2008. Defendants, in seeking to revise this schedule, asked the Court to generally follow this

same scheme, but sought to have the Court allow four months after the filing of their final expert reports before the discovery cutoff. *See* DKT #1297, p. 2. The State, in its response to the Defendants' Motion to Modify the Scheduling Order, followed the original pattern, suggesting that the revised scheduling order continue to allow one month for the completion of discovery after the filing of Defendants' expert reports on remedy. *See* DKT #1322, p. 13. The Court, without discussion, entered the Amended Scheduling Order providing that Defendants' Expert Reports on Damages were to be filed contemporaneously with the Discovery Cut-Off, thereby denying the State the opportunity to conduct discovery of these experts. Not only is this scenario obviously an oversight, Defendants' opposition to allowing the State the fundamental fairness of conducting discovery of certain of its experts is inexplicable.<sup>1</sup> After all, it was Defendants who suggested that four months of discovery were appropriate after they filed their last round of expert reports; they now oppose the State's request that the Court reconsider its schedule and allow one month for such discovery.

WHEREFORE, the State's Motion to Reconsider the Amended Scheduling Order [DKT #1386] should be granted.

Respectfully Submitted,

W.A. Drew Edmondson OBA # 2628  
 ATTORNEY GENERAL  
 Kelly H. Burch OBA #17067  
 J. Trevor Hammons OBA #20234  
 Tina Lynn Izadi OBA #17978  
 Daniel P. Lennington OBA #21577  
 ASSISTANT ATTORNEYS GENERAL  
 State of Oklahoma  
 313 N.E. 21<sup>st</sup> St.  
 Oklahoma City, OK 73105  
 (405) 521-3921

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<sup>1</sup> The State has also suggested that the dispositive motion deadline be pushed back to May 15, 2009, to take into account this movement in the deadline for discovery into Defendants' expert witnesses.

/s/ M. David Riggs

M. David Riggs OBA #7583  
Joseph P. Lennart OBA #5371  
Richard T. Garren OBA #3253  
Douglas A. Wilson OBA #13128  
Sharon K. Weaver OBA #19010  
Robert A. Nance OBA #6581  
D. Sharon Gentry OBA #15641  
RIGGS, ABNEY, NEAL, TURPEN,  
ORBISON & LEWIS  
502 West Sixth Street  
Tulsa, OK 74119  
(918) 587-3161

Louis Werner Bullock OBA #1305  
BULLOCK, BULLOCK & BLAKEMORE  
110 West Seventh Street Suite 110  
Tulsa OK 74119  
(918) 584-2001

James Randall Miller OBA #6214  
222 S. Kenosha  
Tulsa, Ok 74120-2421  
(918) 743-4460

David P. Page OBA #6852  
BELL LEGAL GROUP  
P. O. Box 1769  
Tulsa, Ok 74101-1769  
(918) 398-6800

Frederick C. Baker  
(admitted *pro hac vice*)  
Lee M. Heath  
(admitted *pro hac vice*)  
Elizabeth C. Ward  
(admitted *pro hac vice*)  
Elizabeth Claire Xidis  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
28 Bridgeside Boulevard  
Mount Pleasant, SC 29465  
(843) 216-9280

William H. Narwold  
(admitted *pro hac vice*)

Ingrid L. Moll  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
20 Church Street, 17<sup>th</sup> Floor  
Hartford, CT 06103  
(860) 882-1676

Jonathan D. Orent  
(admitted *pro hac vice*)  
Michael G. Rousseau  
(admitted *pro hac vice*)  
Fidelma L. Fitzpatrick  
(admitted *pro hac vice*)  
MOTLEY RICE, LLC  
321 South Main Street  
Providence, RI 02940  
(401) 457-7700

Attorneys for the State of Oklahoma

**CERTIFICATE OF SERVICE**

I hereby certify that on this 4th day of January, 2008, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

W. A. Drew Edmondson, Attorney General	fc_docket@oag.state.ok.us
Kelly H. Burch, Assistant Attorney General	kelly_burch@oag.state.ok.us
J. Trevor Hammons, Assistant Attorney General	trevor_hammons@oag.state.ok.us
Tina Lynn Izadi, Assistant Attorney General	tina_izadi@oag.state.ok.us
Daniel P. Lennington, Assistant Attorney General	daniel.lennington@oag.ok.gov

M. David Riggs	driggs@riggsabney.com
Joseph P. Lennart	jlennart@riggsabney.com
Richard T. Garren	rgarren@riggsabney.com
Douglas A. Wilson	doug_wilson@riggsabney.com
Sharon K. Weaver	sweaver@riggsabney.com
Robert A. Nance	rnance@riggsabney.com
D. Sharon Gentry	sgentry@riggsabney.com
RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS	

Louis Werner Bullock	lbullock@bullock-blakemore.com
BULLOCK, BULLOCK & BLAKEMORE	

James Randall Miller	rmiller@mkblaw.net
----------------------	--------------------

David P. Page  
BELL LEGAL GROUP

dpage@edbelllaw.com

Frederick C. Baker  
Lee M. Heath  
Elizabeth C. Ward  
Elizabeth Claire Xidis  
William H. Narwold  
Ingrid L. Moll  
Jonathan D. Orent  
Michael G. Rousseau  
Fidelma L. Fitzpatrick  
MOTLEY RICE, LLC  
**Counsel for Plaintiffs**

fbaker@motleyrice.com  
lheath@motleyrice.com  
lward@motleyrice.com  
cxidis@motleyrice.com  
bnarwold@motleyrice.com  
imoll@motleyrice.com  
jorent@motleyrice.com  
mrousseau@motleyrice.com  
ffitzpatrick@motleyrice.com

Robert P. Redemann  
Lawrence W. Zeringue  
David C. Senger  
PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C.

rredemann@pmrlaw.net  
lzingue@pmrlaw.net  
dsenger@pmrlaw.net

Robert E Sanders  
Edwin Stephen Williams  
YOUNG WILLIAMS P.A.

rsanders@youngwilliams.com  
steve.williams@youngwilliams.com

**Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.**

John H. Tucker  
Theresa Noble Hill  
Colin Hampton Tucker  
Leslie Jane Southerland  
RHODES, HIERONYMUS, JONES, TUCKER & GABLE

jtucker@rhodesokla.com  
thill@rhodesokla.com  
ctucker@rhodesokla.com  
lsoutherland@rhodesokla.com

Terry Wayen West  
THE WEST LAW FIRM

terry@thewestlawfirm.com

Delmar R. Ehrich  
Bruce Jones  
Dara D. Mann  
Krisann C. Kleibacker Lee  
Todd P. Walker  
FAEGRE & BENSON, LLP

dehrich@faegre.com  
bjones@faegre.com  
dmann@faegre.com  
kkleee@faegre.com  
twalker@faegre.com

**Counsel for Cargill, Inc. & Cargill Turkey Production, LLC**

James Martin Graves  
Gary V Weeks

jgraves@bassetlawfirm.com  
gweeks@bassetlawfirm.com

Paul E. Thompson, Jr  
BASSETT LAW FIRM

pthompson@bassettlawfirm.com

George W. Owens  
Randall E. Rose  
OWENS LAW FIRM, P.C.

gwo@owenslawfirm.com  
rer@owenslawfirm.com

**Counsel for George's Inc. & George's Farms, Inc.**

A. Scott McDaniel  
Nicole Longwell  
Philip Hixon  
Craig A. Merkes  
MCDANIEL, HIXON, LONGWELL & ACORD, PLLC

smcdaniel@mhla-law.com  
nlongwell@mhla-law.com  
phixon@mhla-law.com  
cmerkes@mhla-law.com

Sherry P. Bartley  
MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC

sbartley@mwsgw.com

**Counsel for Peterson Farms, Inc.**

John Elrod  
Vicki Bronson  
P. Joshua Wisley  
Bruce W. Freeman  
D. Richard Funk  
CONNER & WINTERS, LLP

jelrod@cwlaw.com  
vbronson@cwlaw.com  
jwisley@cwlaw.com  
bfreeman@cwlaw.com  
rfunk@cwlaw.com

**Counsel for Simmons Foods, Inc.**

Stephen L. Jantzen  
Paula M. Buchwald  
Patrick M. Ryan  
RYAN, WHALEY, COLDIRON & SHANDY, P.C.

sjantzen@ryanwhaley.com  
pbuchwald@ryanwhaley.com  
pryan@ryanwhaley.com

Mark D. Hopson  
Jay Thomas Jorgensen  
Timothy K. Webster  
Thomas C. Green  
SIDLEY, AUSTIN, BROWN & WOOD LLP

mhopson@sidley.com  
jjorgensen@sidley.com  
twebster@sidley.com  
tcgreen@sidley.com

Robert W. George  
Michael R. Bond  
Erin W. Thompson  
KUTAK ROCK, LLP

robert.george@kutakrock.com  
michael.bond@kutakrock.com  
erin.thompson@kutakrock.com

**Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.**

R. Thomas Lay  
KERR, IRVINE, RHODES & ABLES

rtl@kiralaw.com

Jennifer Stockton Griffin  
David Gregory Brown  
LATHROP & GAGE LC  
**Counsel for Willow Brook Foods, Inc.**

jgriffin@lathropgage.com

Robin S Conrad  
NATIONAL CHAMBER LITIGATION CENTER

rconrad@uschamber.com

Gary S Chilton  
HOLLADAY, CHILTON AND DEGIUSTI, PLLC  
**Counsel for US Chamber of Commerce and American Tort Reform Association**

gchilton@hcdattorneys.com

Also on this 4th day of January, 2008, I mailed a copy of the above and foregoing pleading to:

**David Gregory Brown**  
Lathrop & Gage LC  
314 E HIGH ST  
JEFFERSON CITY, MO 65101

**Thomas C Green**  
Sidley Austin Brown & Wood LLP  
1501 K ST NW  
WASHINGTON, DC 20005

**Cary Silverman**  
**Victor E Schwartz**  
Shook Hardy & Bacon LLP (Washington DC)  
600 14TH ST NW STE 800  
WASHINGTON, DC 20005-2004

**C Miles Tolbert**  
Secretary of the Environment  
State of Oklahoma  
3800 NORTH CLASSEN  
OKLAHOMA CITY, OK 73118

**Gary V. Weeks**  
Bassett Law Firm  
P. O. Box 3618  
Fayetteville, AR 72702

/s/ M. David Riggs  
M. David Riggs